OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Hon. Geo. H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. O-5743
Re: Tax liability of C. S. Weeks, Trucking Contractor.

You request the opinion of this department as to the liability of C. S. Weeks, Trucking Contractor, for gross receipts tax under Article 14 of House Bill 8 of the 47th Legislature, and for convenience your letter is quoted in full as follows:

"Article 14 of House Bill 8 of the 47th Legislature provides for a tax of 2.2% on gross receipts earned by contract motor carriers, as defined in Chapter 277, Acts of the Regular Session of the 42nd Legislature.

"Mr. C. S. Weeks, doing business as C. S. Weeks Trucking Contractor, Fort Worth, Texas, operates under a contract motor carrier's permit No. 11509. This concern has a contract with the U. S. War Department, Quartermaster Division; they haul perishable merchandise, under U. S. Government seals, between Fort Worth Quartermaster Depot and various Texas Army camps.

"The Fort Work Market Center is one of five in Texas. It receives from the various camps in its territory requisitions for produce in specific amounts, for deliveries, at specified dates. These requisitions are supposed to reach the Fort Worth Center at least twenty days before the expected date of delivery to the various camps. The Fort Worth Center supplies either camps too small to buy in carload lots, or fill in orders between carload shipments to the larger camps.

"Mr. Weeks states that 90% of all goods handled at the Fort Worth Center originate from without the State.

"I am herewith handing you a brief submitted by the attorney for Mr. Weeks. Mr. Weeks contends that his operations are interstate and that he is not liable for the gross receipts tax.

"Your Department has previously ruled on two occasions with reference to contract motor carriers who contended they were operating interstate, and I refer you to your Opinions O-5335 and O-5468, of which I am enclosing copies.

"I will appreciate it if you will give me your opinion as to the tax liability of C. S. Weeks, Trucking Contractor."

The answer to your question must depend upon whether, under the state of facts applicable to Weeks operations, he is engaged in interstate or intrastate commerce as to the commodities transported by him. If interstate, then concededly no tax is due. We have reached the conclusion that all the commodities transported by Weeks having a point of origin without the State are in interstate commerce, and, therefore, the gross receipts therefrom exempt from tax.

In reaching this conclusion, we have not been unmindful of the break in the shipments at Fort Worth, from which point Weeks begins his transportation. Unless this break is of such nature as to convert the shipments from interstate into intrastate in proceeding from Fort Worth, we must still treat the shipments as interstate. Does such a transition take place at Fort Worth? We think not.

One cogent factor must be kept in mind, and that is that Fort Worth is merely the central situs for distribution of the products by one government agency to another, and not a point of ultimate destination. The respective Army camps to which the products are distributed constitute the final destination; and this is so understood by all the parties, which understanding is consummated in truth and in fact. To conclude otherwise we would have to substitute form for substance, fiction for truth. In thus concluding, we are not

unmindful that our Courts, including the Supreme Court of the United States, recognize a distinction in tax cases from other fields wherein only reasonable and solitary regulations may be involved. This is manifest from the following taken from the case of Stafford v. Wallace (Supreme Court of the United States) 23 A. L. R. 229, quoting with approval from Swift & Co. v. U. S., 49 L. Ed. 518:

> "'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress where such interference is deemed necessary for the protection of commerce among the states.'
>
> ". . .
>
> "'The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority.'"

But the Court in this same case said:

> "Moreover, it will be noted that even in tax cases, where the tax is directed against a commodity in an actual flowing and constant stream out of a state, from which the owner may withdraw part of it for use or sale in the state before it reaches the state border, we have held that a tax on the flow is a burden on interstate commerce which the state may not impose because such flow in interstate commerce is an established course of business. United Fuel Gas Co. v. Hallanan, decided December 12, 1921 (257 U. S. 277, 66 L. ed. 234, 42 Sup. Ct. Rep. 105); Eureka Pipe Line Co. v. Hallanan, decided December 12, 1921 (257 U. S. 265, 66 L. ed. 227, 42 Sup. Ct. Rep. 101). . . ."

The very recent case of Walling v. Jacksonville Paper Co., (Supreme Court of the United States) 87 L. Ed. 393, makes clear the rule which we think applicable to this case. We quote:

"The Administrator contends in the first place that under the decision below any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status. In that connection it is pointed out that prior to this litigation respondent's trucks would pick up at the terminals of the interstate carriers goods destined to specific customers, return to the warehouse for checking and proceed immediately to the customer's place of business without unloading. That practice was changed. The goods were unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as convenient. The opinion of the Circuit Court of Appeals is susceptible of the interpretation that such a pause at the warehouses is sufficient to make the Act inapplicable to the subsequent movement of the goods to their intended destination. We believe, however, that the adoption of that view would result in too narrow a construction of the Act. It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication (apart from the exemptions contained in § 13, 29 USCA § 213) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (cf. De Loach v. Crowley's, Inc. (CCA 5th) 128 F(2d) 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

". . . If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. . . ."

The case of Baltimore & O. S. W. R. Co. v. Settle, (Supreme Court of the United States) 67 L. Ed. 166, is typical of the rule that the intention of the parties as to when and where the shipment comes to its ultimate end is of paramount importance in determining whether the shipment is interstate or intrastate from an intermediate point of interruption or pause within the State. We quote from this case as follows:

"If the intention with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley, and that they were not rebilled for several days, would have justified the jury in finding that it was originally the intention to end the movement at Oakley, and that the rebilling to Madisonville was an afterthought. But the defendant Clephane admitted at the trial that it was intended from the beginning that the cars should go to Madisonville; and this fact was assumed in the instructions complained of. In other words, Madisonville was at all times the destination of the cars; Oakley was to be merely an intermediate stopping place; and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention, as it was carried out, determined, as matter of law, the essential nature of the movement; and hence, that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a

through shipment; and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply."(citing cases)

To the same effect is the case of Binderup v. Pathe Exchange, 68 L. Ed. 308, (Supreme Court of the United States) in the following language:

"The intermediate delivery to the agency did not end, and was not intended to end, the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character, 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.'" (Loc. Cit. 68 L. Ed. 316)

We deem the foregoing sufficient to support our conclusion that the operations of C. S. Weeks, under the facts submitted, are not subject to gross receipts tax imposed by Article 14 of House Bill No. 8, Acts of the 47th Legislature insofar as applicable to the products (perishable fruits and vegetables) shipped from without the State, and hence interstate shipments; but as to that portion of the shipments, whether ten per cent, more or less, originating within the State, and admittedly intrastate, the tax is due and owing by C. S. Weeks, and you are accordingly so advised.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By L. P. Lollar
Assistant

APPROVED
OPINION
COMMITTEE
BY Burg
CHAIRMAN

LPL:AMM